

Defending Noncitizens Charged With RCW Misdemeanor Harassment¹

Misdemeanor Harassment (MH), RCW 9A.46.020 should not be classed as a “crime involving moral turpitude” (CIMT) that can trigger CIMT inadmissibility or deportability grounds; nor as a “crime of violence” that can trigger the “crime of DV” deportability ground.

I. STEP ONE: IDENTIFY IMMIGRATION STATUS & DEFENSE GOALS

Status	Goals
<p>Undocumented Person (UP):</p> <ul style="list-style-type: none"> Entered without inspection and never had status. Came lawfully with temporary visa (e.g. student or tourist) that has since expired. Identify how long they have been in the U.S. and if they have LPR/USC family. Identify prior deportations & ICE contact. <p><i>Note:</i> Many UPs, especially if without prior deportations, have paths to lawful status.</p>	<ul style="list-style-type: none"> A UP in jail for even a day risks exposure to ICE, having (illegal²) communication with ICE occur, and ending up in ICE custody & removal proceedings. Preserve paths to legal status (relief). There are waivers of deportation for long-term resident UPs who meet certain conditions, including having a qualifying relative.³ Family relationships help identify “qualifying relatives” for relief.
<p>Lawful Permanent Residents (LPR or green card holders); Asylees and Refugees; COFA (Pacific Island Compact nation) residents: Identify how long person has had lawful status.</p>	<ul style="list-style-type: none"> An A4 conviction will not trigger deportation or inadmissibility by itself. For LPRs, preserve “good moral character” for naturalization (US citizenship). LPRs cannot apply for US citizenship while on probation.
<p>Visa Holders (e.g. business, student & tourist visas): If current, goals = LPRs & refugees. If expired, goals = UPs. <i>See above</i></p>	
<ul style="list-style-type: none"> DACA holders: Third misdemeanor is a bar, any GM + “DV” is probably a bar; TPS holder: Second misdemeanor is a bar. 	

Criminal History is Critical – Obtaining a complete criminal history, including sentences, is essential to provide accurate advice.

¹ This advisory is meant to serve as a quick-reference guide for defenders with noncitizen clients. Defenders are advised to consult specifically with WDA’s Immigration Project on individual cases by completing an intake form online at: <http://www.defensenet.org/immigration-project/case-assistance>.

Immigration attorneys or representatives are encouraged to contact us for possible legal arguments to challenge a removal charge or other immigration consequence. When in doubt, don’t concede!

² See RCW 10.93.160

³ See our advisory on “10-year cancellation of removal,” the principal form of relief, but there can be others: <https://defensenet.org/resource-category/cancellation-of-removal-for-undocumented-persons/>

II. STEP TWO: DEFENSE STRATEGIES

Misdemeanor Harassment should not risk being deemed a “crime involving moral turpitude”(CIMT),⁴ but, *if possible*:

- ❖ **Do a straight plea** (not *Alford* plea) that does not incorporate police reports or certification for determination of PC nor stipulates to such as providing the factual basis for plea (especially if those relate to a more serious original charge). Removing “DV” label /indicia is always preferable.
- ❖ Criminal history is still critical. **If a client’s lifetime, aggregate, total of all (non-concurrent) sentences, regardless of suspension, reaches 1825 days (5 years), it will trigger separate criminal inadmissibility.** This can affect an LPR who departs the US, and thereby becomes subject to inadmissibility grounds. If client is under 1825 days, try to keep them under.
- ❖ **Obtain a sentence of 180 days or less**, regardless of time suspended. This is generally desirable because of the above; in some cases it makes the CIMT question simpler.
- ❖ Follow rule that it is best to **plead to the least culpable conduct** in a statute. If possible, don’t plead to threat to cause “bodily injury.” Other §§ are preferable, esp. (1)(a)(ii) (property); or, plead without specifying. (This recommendation may seem paradoxical, given statement that MH is a single crime, and is *not* a CIMT or a CODV but may help unrepresented noncitizens avoid legal argument with a hostile adjudicator, or affect non-“categorical,” discretionary decisions.)

MH is not a deportable “Crime of Domestic Violence” (CODV)

- ❖ MH does not have use or threat of use of violent force as a required element,⁵ so is not a crime of violence as defined in 18 USC 16(a), a requirement of the CODV ground, even if labeled “DV.”

Safer alternative misdemeanors

Safe (non-triggering) misdemeanor alternatives include:

- ❖ Criminal Trespass; Disorderly Conduct, Obstructing; Malicious Mischief 3; Assault 4.

⁴ This is because a threat to “cause bodily injury” §(1)(a)(i) is not a separate crime, but only *an alternate means*. See WPIC 36.07 on MH —Elements: “To return a verdict of guilty, the jury need not be unanimous as to which of alternatives [(1)(a),] [(1)(b),] [(1)(c),] or [(1)(d)] has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.” The four alternatives correspond to RCW §§ 9A.46.020(1)(a)(i-iv). See *State v. G.S.*, 104 Wash. App. 643, 648, 17 P.3d 1221, 1224 (2001), *abrogated on different basis by State v. J.M.*, 144 Wash. 2d 472, 28 P.3d 720 (2001) (“The most natural reading of RCW 9A.46.020(1)(a) shows that the Legislature created four alternative means by which someone violates the criminal harassment statute. The statute sets forth four types of threatening behaviors that constitute harassment, each of which is in a subsection separated from the others by the disjunctive ‘or.’”). See also *State v. Grayson*, 107 Wash. App. 1051 (2001)(unpub) *State v. Brown*, 138 Wash. App. 1059 (2007)(unpub); *State v. Powell*, 116 Wash. App. 1049 (2003)(unpub).

⁵ See *Matter of Julio E. Velasquez* 25 I. & N. Dec. 278, 283 (BIA 2010) (“An offense cannot . . . be classified as a “categorical” crime of violence unless it includes as an element the actual, attempted, or threatened use of violent force that is capable of causing pain or injury.” Id.)